

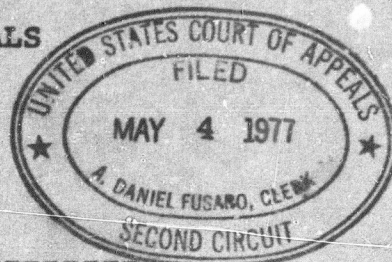
***United States Court of Appeals
for the Second Circuit***



PETITION

77-3029

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



Docket No. 77-

IN THE MATTER
OF
WILLIAM COOPER

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PETITION FOR WRIT OF MANDAMUS

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PETITION FOR WRIT OF MANDAMUS

William Cooper petitions for mandamus, 28 U.S.C. 1651, to compel Eastern District Judge Thomas C. Platt to stay his criminal trial for interstate transportation of forged securities (18 U.S.C. 2314) scheduled to commence May 9, 1977. We request also temporary stay of that trial pending determination of this petition.

The nub of the petition is as follows:

On hearing, both Cooper's neurologist and the Government's neurologist confirmed that Cooper suffers from continuous and unremitting pain as a residue of prior massive surgery, that he must take regular heavy doses of medication, and that the pain and medication combined interfere with his physical and mental functioning. Both insisted that he could not undergo or participate in a trial at this time. The district court rejected both opinions and ordered the trial to proceed on May 9 because an internist it appointed believed the pain was probably caused by a duodenal ulcer and that

given time and proper treatment the ulcer and the pain could subside. But the internist candidly admitted that his ulcer diagnosis (which was directly contrary to that of the Government's expert and Cooper's as well) might be wrong; and that diagnosis was in fact proven wrong when with time and "proper treatment" the pain did not subside. In any event even the internist conceded that the level of Cooper's medication significantly interfered with his ability to function at trial.

The district court, we submit, clearly abused its discretion in finding that the Government carried its burden of demonstrating that the trial should proceed. Mandamus is proper to correct that error.

Indictment; Marks and Chernik Reports

On April 29, 1974 the Government filed indictment 74 CR 333 charging Cooper with three counts of transporting forged securities across state lines (A 1).^{*} Through 1974 and 1975 there were various communications with the court arising from the fact that Cooper, then sixty-three (now sixty-six) had experienced severe pains in his chest and stomach after he underwent radical surgery in 1969, along with a variety of other serious ailments from hypertension to coronary artery disease. We take a moment now to summarize the findings of two of the reports so this Court can understand the medical background of what transpired later.

One, dated November 7, 1974 (A 3), from Dr. Chernik, Cooper's neurologist at the Sloan-Kettering Cancer Center, stated: In May 1969 Cooper had combined thoracic and abdominal surgery to repair a "massive diaphragmatic herniation of the colon into the chest cavity", complicated by problems in the left lung. Immediately after the surgery Cooper had severe chest pains, requiring a second operation in November 1969 to stabilize the chest wall and remove

^{*} A denotes the separate appendix to this petition which contains parts of the record below needed to decide the issue.

peripheral nerves from affected ribs. A cerebrovascular accident further complicated the operation and left Cooper with left side weakness (A 4). Chest pain in the area of the surgical incision continued unabated with no response to attempted cures (A 4). In addition Cooper suffered from recurrent polyps of the large bowels and persistent blood tinged sputum.

The second report, dated May 13, 1976 (A 5) was from Dr. Morton Marks, another neurologist who examined Cooper on behalf of the Government. He noted, as did Chernik, the marked tenderness in the area of the surgical incision, the severe pain arising therefrom, the left-sided weakness, the coughing up of blood, the recurrent bowel problems and several other symptoms. He viewed Cooper's medical problems as "extremely serious", stated that the physical and emotional strain of a trial "would aggravate and accentuate the pain and discomfort", and recommended that Cooper "not stand trial at this time" (A 6).

The September 24 Hearing

In September 1976 Judge Platt heard testimony from Drs. Chernik and Marks in order principally to ascertain whether there was substance to the Government's suspicion that Cooper might be feigning pain. Dr. Chernik, however,

demonstrated that structural alterations from the surgery produced Cooper's pain and that there had been numerous unsuccessful attempts to remedy it, including acupuncture (A 7-9). The severe pain required large quantities of drugs (some every two hours) (A 19) and these drugs clouded his mind, made him lethargic, and took away his ability to function properly in his own defense (A 8-10). Dr. Marks, who by then had examined Cooper twice for the Government (A 15), agreed with the Chernik analysis (A 15-17), agreed that the drugs would significantly interfere with his ability to participate in the trial (A 22-23), and agreed with Chernik's recommendation that Cooper not stand trial at that time (A 17-21). The district court stated, however, that he was "not convinced one way or the other" (A 24) and that he might commit Cooper to a hospital "for a sustained period of time" for a thorough examination and from it the benefit of a third opinion (A 24-25).

The Alsop Opinion; the March Hearing

That procedure was not followed. The district court did indeed solicit a third opinion (A 26) but it did not come from a hospital, it did not follow sustained observation, and it did not follow a thorough examination. And although the principal subject was whether Cooper's pain following his operation was real (A 27), the doctor to whom the court turned,

Reese Alsop, was not a neurologist with that specialty, but an internist.

Dr. Alsop's opinion that Cooper could stand trial "with good medical management" is reflected in his March 7, 1977 report (A 28) and was repeated at a further hearing the district court held on March 23, 1977. He acknowledged Cooper's extensive surgery and the tenderness therefrom and the "real possibility" that this was the cause of Cooper's pain (A 30). He observed also borderline hypertension, coronary artery disease, and multiple polyposis (A 30). What intrigued him most, however, was the possibility that Cooper had three large, active duodenal ulcers. These, he believed, might be the cause of the pain, and he thought it "interesting to see what careful ulcer management could achieve" (A 30).

Cross-examination of Dr. Alsop at the March hearing brought out the following:

(a) That if Cooper had had intractable pain for five years, ulcers could not be the cause (A 34). Alsop doubted such pain, however, without any backing whatever for that view except his belief that patient's memories are fallible (A 35).

(b) That the ulcer diagnosis was inconsistent with the textbook authorities on ulcers (A 36).

(c) That the ulcer diagnosis was inconsistent with another X-Ray series taken two weeks after the Alsop examination. Alsop explained the contrary results on the basis that the ulcer may have "healed" in that length of time (A 37) if Cooper had followed Alsop's regimen of "antacids and stay away from tea, coffee, alcohol and spices, and frequent small feedings" (A 37-38).

(d) That the ulcer diagnosis was inconsistent with the fact that Cooper had previously had certain nerves removed. See also A 29.

(e) That the ulcer diagnosis was inconsistent with the fact that Cooper had a hernia operation some years earlier at which time there was no ulcer.

(f) That Alsop had made a mistake when he said in his report that Cooper's brother was alive. That brother in fact died of myocardial infarction. Alsop made another mistake in saying that Cooper had a colonoscopic examination in February 1977. The examination was cancelled because of Cooper's heart problem.

Alsop made three further significant concessions. First, he admitted that Drs. Marks and Chernik might be right about the cause of the pain and he wrong. Indeed the only point in the whole business about the ulcers was that one

ought to try to clear up the ulcers (or what Alsop thought were ulcers) and see what happened (A 45). This, he estimated, might take six weeks.

Second, he stated that there was a 90% chance that Cooper had coronary artery disease (A 42) so that a trial would threaten his life.

Finally, he stated that in view of the level of medication Cooper was taking (A 35-36) "it's fair to say that he would have trouble with his defense" (A 37). See also A 31-33.

At the conclusion of the hearing the Court suggested that Cooper follow Alsop's prescription for treating the ulcer and then be re-examined. That re-examination took place on April 18 (A 46). The pain remained unabated (A 47) which effectively eliminated Alsop's ulcer diagnosis. Alsop, however, continued to adhere to that diagnosis.*

The April 29 Hearing

The parties returned to court on April 29. The district court refused Cooper's request for further testimony to demonstrate that Alsop's analysis could not be right. It stated instead, that it had "great confidence" in Alsop, had selected him to obtain an independent view, and that no

* In addition to the fact that Alsop's treatment did not work and to Chernik (A 53) and Marks, the opinions of at least three other highly qualified doctors (e.g. A 49, 51, 56) showed that Alsop could not possibly be right in attributing the chest pains to an ulcer.

objection had been raised to his choice. Referring to Alsop's testimony and findings that Cooper had sufficient ability to consult with his attorney with a reasonable degree of rational understanding and understand the proceedings (and noting incidentally its own observation at the March 23 hearing that Cooper had assisted his counsel), the Court denied defendant's application to stay the trial and fixed May 9 as the date for it to commence (A 57-58).

The Abuse of Discretion Below

The district court treated the application to stay the trial as raising issues under 18 USC 4244, to wit, whether Cooper could understand the proceedings and assist in his defense. Technically that may not have been right since the issue was not really mental competence in the sense of sickness or derangement, as section 4244 seems to contemplate, but more broadly whether Cooper ought to be forced to trial in extreme pain and, as a second issue, whether in view of the medication he had to take to dull that pain, his ability to assist in his defense would be impaired to a degree to render trial at this time inappropriate. U.S. v. Knohl, 379 F.2d 429, 436 (2d Cir. 1967).^{*} We pass the technical question, however, since Section 4244 declares the common law which preceded it and its procedures may appropriately be followed in

^{*} These are due process and Eighth Amendment cruel and unusual punishment questions. See generally Pate v. Robinson, 383 U.S. 375 (1960); Drope v. Missouri, 420 U.S. 162 (1975).

analogous situations such as that presented here, United States v. Knohl, *supra*; United States v. Valentino, 283 F.2d 634, 635 (2d Cir. 1960); and deal directly with the merits.

The burden on these issues was the Government's. The district court committed a gross abuse of discretion in finding that it met it. United States v. DiGilio, 538 F.2d 972, 988 (3d Cir. 1973).

First, with respect to the pain itself, the Government failed to show that it was not real--a position which had motivated its opposition to the stay in the first place (A 27). On the contrary its own expert, Dr. Marks, confirmed that Cooper was not feigning, as did Dr. Alsop at the time of his examinations (A 32).

Second, the record did not possibly admit to a finding that the cause of the pain was an ulcer, and no amount of the court's prior confidence in Dr. Alsop could justify acceptance of that view. It was not only the considered opinion of the several neurologists who testified or were prepared to testify for Cooper, nor the significant inconsistencies in Alsop's diagnosis, even to the point of suggestion that the ulcers had healed in two weeks. It was the uncontroverted fact that although Alsop's "regimen" had been followed, the chest pain had not subsided. And it was the further element, which neither the Government nor the

court could avoid, that the Government's own expert, certainly not "partisan" to Cooper (A 57) stated unequivocally that the pain resulted from the 1969 surgery, not from an ulcer.

Third, even if Alsop opposed the other experts on the fact that ulcers caused the pain, and that it would disappear with a mild diet (which of course did not turn out to be the case), he very much agreed with them that as long as Cooper took pain killing drugs, his ability to assist in his defense would be significantly impaired. He insisted, moreover, that until the alleged ulcer was cured trial was not appropriate, and indeed the foundation for the court's further delay at the March 23 hearing and the order for Alsop's re-examination six weeks later was that in the interim, while the pain persisted, no trial could be had. But the new examination changed nothing except to show the error in Alsop's diagnosis. The ulcer regimen was tried. The pain did not go away.

The district court, therefore, was clearly wrong in disregarding Cooper's severe pain and its effect, disregarding the massive medication and its effect, disregarding the neurological experts of both sides, and basing its opinion, as it did, on Alsop's views which rested on one mistake after another. As to the court's observations of Cooper's demeanor at the March 23 hearing, that carries little weight. In the first place it was the Alsop opinion

not those observations upon which the district court rested its denial of the stay. Beyond that, however, the brief observations of a lay court could not prevail over the unanimous testimony of all of the experts, including the Government's and the court's, that the level of medication would effect Cooper's ability to assist his counsel over the course of the trial. Saddler v. United States, 531 F.2d 83 (2d Cir. 1976) (Court's observations of defendant's seeming rationality at guilty plea not conclusive).*

Mandamus is the Proper Remedy

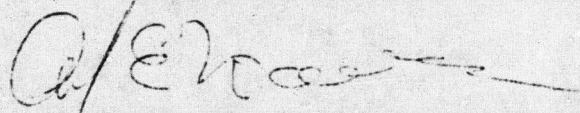
Mandamus is appropriate to compel the court below to issue the stay requested. Kaufman v. Edelstein, 539 F.2d 811, 819 (2d Cir. 1976) (mandamus to correct clear abuse of discretion); United States v. Dooling, 406 F.2d 192 (2d Cir. 1969) (mandamus in exercise of supervisory power); Stans v. Gagliardi, 485 F.2d 1290, 1293 (2d Cir. 1973) (Lumbard, dissenting) ("supervisory power over the administration of criminal justice must be exercised when a situation crying out for its use is clearly presented"); United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972) ("calculated and repeated disregard of governing rules"). Compare Rastelli v. Platt, 534 F.2d 1011 (2d Cir. 1976) and In re Sutter, 543 F.2d 1030, 1033 (2d Cir. 1976). See, also, Kerr v. United States District Court, 48 L.Ed. 2d 725 (Sup.Ct. 1976) (no other adequate means to attain the relief desired).

* See also Rand v. Swenson, 501 F.2d 394, 395 (8th Cir. 1974); Pate v. Robinson, supra; Drope v. Missouri, supra.

Conclusion

The petition should be granted and an order issued directing the district court to stay Cooper's trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "A. Wallach", written over a horizontal line.

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